

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

DAVID L. FISH, JR.,

Plaintiff,

v.

MARINE BIOLOGICAL LABORATORY,

Defendant.

Civ. A. No. 05-11619-RGS

**DEFENDANT MARINE BIOLOGICAL LABORATORY'S
RESPONSE TO PLAINTIFF'S OPPOSITION TO ITS
MOTION FOR JUDGMENT ON THE PLEADINGS**

Pursuant to the Court's instructions at the Scheduling Conference held on September 22, 2005 that the Defendant Marine Biological Laboratory ("Defendant" or the "MBL") respond to Plaintiff David L. Fish, Jr.'s ("Plaintiff") Opposition to Defendant's Motion for Judgment on the Pleadings (the "Opposition Memo") within ten days, Defendant hereby submits this memorandum to respond to Plaintiff's Opposition Memo. In short, Plaintiff's Opposition Memo cannot change the factual averments in the Complaint, which establish that Plaintiff cannot avoid a judgment on the pleadings.

I. Plaintiff Has Not Allege Facts Sufficient to Support His Claims.

Although Plaintiff states that he can provide the Court with "an abundance of evidentiary documents to prove facts in support of his claim," he has failed to allege any facts to support his claims or entitle him to relief. In his Opposition Memo, Plaintiff inexplicably points only to a Front Office Assistant Position Description and two Front Office Assistant Position Announcements to argue that he can prove that the Watchperson and Front Office Assistant

positions require the same level of skill, effort and responsibility. Tellingly, Plaintiff fails to attach a Watchperson Position Description (his current position) or Watchperson Position Announcement to compare against the Front Office Assistant documents. Plaintiff has not referenced documents describing the Watchperson position because such description would only confirm and highlight the glaring discrepancies in the skills, effort and responsibilities required of each position. Rather than show that Plaintiff can prove facts to support his claims, the Front Office Assistant Position Description and Position Announcements that Plaintiff references simply describe the functions of the Front Office Assistant position, which are drastically different than the functions of the Watchperson position, as the Plaintiff himself has admitted.

See Complaint ¶ 6. In paragraph 6 of his Complaint, Plaintiff admits (as he must) that Watchpersons do not perform daily audits or data entry and do not run reports, which are duties of the Front Office Assistants. Further, Plaintiff's claims of discriminatory training and assignment of work and retaliation cannot stand because the positions necessitate different training, assignments and hours of overtime due to the differences between the positions, which Defendant has admitted exist.

II. The Terms of the CBA Provide a Defense to Plaintiff's Discrimination Claims Because the CBA is a Differential Based on a Factor Other Than Sex.

As Defendant discussed in its Memorandum in Support of its Motion for Judgment on the Pleadings, any discrepancy in the pay of Watchpersons and Front Office Assistants is the result of the pay grade system set forth in the Collective Bargaining Agreement (the "CBA") negotiated and agreed upon by Plaintiff's union, Hospital Workers Local 2020, affiliated with Service Employees International Union (the "Union") and the MBL. Under both the Federal Equal Pay Act and Title VII, an employer may defend a claim of unequal pay by showing that the pay difference is due to a "differential other than sex." See 29 U.S.C. § 206(d)(1); 42 U.S.C.

§ 2000 e-2(h). In his Opposition Memorandum, Plaintiff attempts to rebut Defendant's reliance on the CBA as a "differential other than sex" that provides a defense to his claims. However, Defendant merely cites a Second Circuit case which actually supports Defendant's position. In Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520 (2nd Cir. 1992), the Court stated that a job classification system may serve as a defense to sex-based wage discrimination claims "when the employer proves that the job classification system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue."¹ Id. at 525. Here, the Defendant's pay grade classifications are rooted in legitimate business-related differences in work responsibilities and qualifications, as evidenced by the fact that they are the product of a negotiated CBA between management and the Union and the CBA provides for a mechanism whereby "[a]ny worker who feels he/she is graded incorrectly . . . may appeal to the grading committee" for his/her position grade to be upgraded." See Exhibit 1 to Defendant's Answer, Article V, § 2B. Indeed, no facts have been alleged to suggest any discriminatory animus in the creation of the job classification system.

III. Defendant's Actions Did Not Preclude the Plaintiff from Pursuing the Administrative Remedies Provided by the CBA.

In his Opposition Memo, Plaintiff incorrectly alleges that Defendant's Equal Employment Opportunity Coordinator Jane MacNeil failed to respond to his complaints of discrimination, causing him to be unable to pursue relief under the CBA. Opposition Memo, pp. 3-4. First, Ms. MacNeil did respond to Plaintiff's complaints of discrimination, as Plaintiff himself admits when he states that Ms. MacNeil sent him a letter explaining that the basis for the

¹ The First Circuit has not ruled on whether a job classification or collective bargaining agreement can serve as a "differential other than sex" without proving further elements. However, a Maryland District Court has held that, where a Defendant asserts that a wage differential was based on a bona fide job classification system, the burden then falls to the plaintiff to show that the jobs involved equal skill, effort and responsibility. Usery v. Bd. of Educ. of Baltimore County, 462 F.Supp. 535, 553 (D. Md. 1978). In this case, Plaintiff cannot meet this burden, as he has already admitted to significant differences in the skills and responsibilities required by the Watchpersons and Front Office Assistants. See Complaint, ¶ 6.

difference in pay grade of the Watchperson and Front Office Assistant positions was due to the difference in work assignments, level of effort and responsibilities required by each position.

See Complaint, ¶ 6. Second, there is no provision in the CBA that would have precluded Plaintiff from filing a grievance or seeking a remedy in accordance with the CBA either before, simultaneous with, or after his complaints to Ms. MacNeil.² In fact, Plaintiff could have requested that the grading committee evaluate the grades of the Watchperson and Front Office Assistant positions before, at the same time or after he filed his internal complaint with Ms. MacNeil. Further, Plaintiff falsely and in conclusory fashion alleges that Mary Beckwith's practices of assigning work and training opportunities made it highly unlikely that any appeal by him to the grading committee as outlined in the CBA would result in an upgrade. However, Plaintiff does not support this statement with any allegation of fact and fails to note that the CBA provides that the grading committee shall consist of diverse members, including two members of the bargaining unit. See Exhibit 1 to Defendant's Answer, Article V, § 2B.

IV. CONCLUSION

Plaintiff has failed to plead any facts that would entitle him to relief under his claims and which would allow his claims to survive Defendant's Motion for Judgment on the Pleadings. For all of the reasons stated herein and in its Memorandum in Support of its Motion for Judgment on the Pleadings, Defendant requests that the Court grant its Motion for Judgment on

² The CBA provides that “[a]ny dispute involving the interpretation or application of the Agreement shall be deemed a grievance and must be filed . . . within ten (10) working days after the aggrieved worker(s) or union knew or had reason to know of the grievance.” See Exhibit 1 to Defendant's Answer, Article XXV.

the Pleadings and award it attorneys' fees and costs.

Respectfully submitted,

THE MARINE BIOLOGICAL LABORATORY,

By its attorneys,

/s/ Julie Murphy Clinton

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Dated: November 3, 2005

CERTIFICATE OF SERVICE

I, Julie Murphy Clinton, hereby certify that on November 3, 2005, I caused a copy of the foregoing Response to Plaintiff's Opposition to Defendant's Motion for Judgment on the Pleadings to be served by first-class mail upon the plaintiff, David L. Fish, Jr.

/s/ Julie Murphy Clinton